

# The Authors Guild, Inc.

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February 4, 2013

Karyn Temple Claggett  
Associate Register and Director, Policy & International Affairs  
U.S. Copyright Office  
Washington D.C.

Re: Notice of Inquiry Concerning Orphan Works and Mass Digitization

Dear Ms. Temple Claggett:

Pursuant to the Notice of Inquiry published by the Copyright Office in the Federal Register on October 22, 2012, the Authors Guild hereby submits these comments on behalf of its more than 8,500 members who are published book authors and freelance journalists. We appreciate this opportunity to revisit the issue of permitting the occasional use of orphan works and to comment on the possibility of a legislative approach to the mass digitization of copyright protected works.

Since we last submitted comments to the Copyright Office on the issue of orphan works in May 2005, we've worked hard to find practical solutions to some of the problems posed by orphan works. Along the way, we've learned a great deal about the true scope of the problem and the merits of some proposed solutions. Briefly,

*1. Diligent searches are not the answer to the orphan works problem.* This approach appeared promising to many, including us, but it simply doesn't work in practice. The incentives are all wrong, rewarding failed searches with uncompensated use of copyright-protected materials. Diligent searches may prove to be part of the solution, but such searches must be coupled with the payment of a reasonable license fee for the proposed use.

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*2. The orphan works problem, at least for rightsholders in books, appears to be vastly overstated.* Those holding rights to in-print books can readily be found, of course. The difficulties in finding authors of out-of-print works are not nearly as daunting as some have suggested. In 2009, for example, out of a sample of 1,000 authors of out-of-print books for which the Authors Registry had collected overseas photocopy royalties, the Registry located and paid more than 87%. Similarly, the Guild's 2005 survey of members found that 85% had "never" or "rarely" been unable to reach a copyright owner to request permission to use a copyrighted work.

*3. Foreign licensing and collecting organizations have been efficiently licensing orphan works for decades.* We should learn from their examples. Collective licensing for a well-defined, limited set of uses may be the only means of addressing the complex compensation, control, and security issues raised by the mass digitization of books.

*4. Uses permitted under any orphan works regime should be carefully circumscribed, to avoid damaging literary markets here and abroad.* Any potential uses should be carefully weighed, with a strong preference given to uses that help authors, artists, filmmakers and others make new creative works. Rote copying of entire works, permitting a user to take on the publishing function, should be avoided. Care should especially be taken to avoid disrupting existing, well-functioning permissions markets served by literary agents, publishers, and authors.

Although arriving at solutions to the problems posed by orphan works appears to be more challenging than ever, we still believe that solutions that respect authors' rights and strengthen the literary markets that copyright is intended to foster are achievable.

The Authors Guild looks forward to providing the Copyright Office with any further assistance it can as it explores the issues of orphan works and the mass digitization of books.

Respectfully submitted,

/s/

Paul Aiken  
Executive Director